

Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act



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Studies, including studies by the Department of Justice, show that the vast majority of sex offenders do not reoffend, that sex offender treatment is effective, and that community support and stability are essential to rehabilitation. Publication on an Internet sex offender registry very often results in job loss, homelessness, disruption of treatment, loss of social and family support, harassment, and even violence. When used indiscriminately for low- and high-risk offenders alike, public notification interferes with rehabilitation, thus diminishing public safety, and wastes resources better spent on the relatively small number of offenders who are dangerous and likely to recidivate.

About half the states use a risk-assessment model, which classifies sex offenders according to dangerousness and risk of recidivism and limits public notification accordingly. The Sex Offender Registration and Notification Act of 2006 (SORNA), however, requires the states to adopt a harsh one-size-fits-all policy by July 26, 2009, or lose Byrne Grant funds. The SORNA was enacted without hearings. The states were not consulted and current state practices were not considered. Input from organizations with expertise in the area was ignored. It is not too late to rethink this flawed policy.

I. SORNA: A Misguided One-Size-Fits-All Policy

The SORNA, enacted on July 27, 2006, as Title I of the Adam Walsh Act, requires the states, the District of Columbia, the territories, and Indian tribes to “substantially implement” its terms, “as determined by the Attorney General,” by July 27, 2009, or be penalized by the loss of 10 percent of Byrne Grant funds they would otherwise receive.¹ Under SORNA, a “sex offender” is a person convicted under the law of any jurisdiction of any kind of sex offense, broadly defined.² This includes a juvenile adjudicated delinquent for an attempted sexual act if he was at least fourteen years old.³ It includes a teenaged boy convicted of consensual sexual contact with his girlfriend if she was a day over four years younger.⁴

For every sex offender as defined under SORNA, a broad range of information is required to be published on the Internet. Offenders are placed in one of three tier levels requiring registration and Internet notification for

fifteen years, twenty-five years, or life. The tier levels are based not on dangerousness or risk of reoffense but on the offense alone. The fourteen-year-old boy adjudicated delinquent of an attempted sexual act remains on the registry for life.⁵ The eighteen-year-old boy convicted of consensual sexual contact with his girlfriend is on the registry for twenty-five years.⁶ The vast majority of offenders are subject to registration and Internet publication for twenty-five years or life, even with a clean record and successful completion of treatment.⁷ There is no opportunity to petition for removal based on lack of dangerousness, a low risk of recidivism, or remoteness.

In enacting the SORNA, Congress delegated, or perhaps abdicated, its legislative responsibility to decide whether the law would be retroactive to the Attorney General. The Attorney General has declared that SORNA is fully retroactive to all sex offenders convicted at any time in the past even now when no jurisdiction has yet implemented the law.⁸ According to these regulations, persons who were never required to register, completed their period of registration, or were removed from the registry based on a low risk assessment are now required to register and to be broadcast on the Internet.⁹ The SMART Office of the Justice Department recognizes the impracticality of identifying, notifying, and registering all such persons, and so has determined that a jurisdiction will be in compliance if it endeavors to notify and register persons who, at the time of implementation, are currently in the system as registrants, prisoners, or supervisees for an offense of any kind or are convicted of a new offense of any kind.¹⁰ This still requires registration and Internet publication of persons who have already fulfilled state registry requirements, were removed from the registry based on a low risk assessment, or were never subject to registration requirements in the first place.

Moreover, the Department of Justice—the same body that deemed the law retroactive—regularly prosecutes people who have never been given notice of a duty to register or been registered by an appropriate state official as SORNA requires—which includes every person charged thus far as no jurisdiction has yet implemented the law—for the new crime of failure to register as required by SORNA. Many of these unfair prosecutions have been dismissed as in

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violation of various constitutional provisions, but many have been allowed to go forward.¹¹ If the law remains on the books, the Supreme Court will likely review it and may well strike it down.

II. The Risk Assessment Model

Under the Wetterling Act, enacted in 1994 and amended in 2003 and 2005, the states are required to register sex offenders and to release “relevant information that is necessary to protect the public.”¹² Under the Wetterling Act, the states “retain discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes and to specify standards and procedures for making these determinations,” including the use of “particularized risk assessments of registered offenders, with differing degrees of information release based on the degree of risk.”¹³

Currently, about half the states use a risk assessment model. Under this model, sex offenders are classified according to actuarial instruments that estimate the probability of sexual reoffense on the basis of actual recidivism rates of other convicted sex offenders with the same characteristics, and community notification is limited to dangerous offenders with a high or moderate risk of recidivism.¹⁴

As written, SORNA will repeal the Wetterling Act as of July 27, 2009.¹⁵ Jurisdictions using the risk assessment model that seek certification by the Attorney General will be deemed not in compliance.¹⁶

III. Opposition from Victim Advocates, Treatment Professionals, and State Governments

The National Alliance to End Sexual Violence, the national policy arm of all state sexual assault coalitions across the country whose mission is to advocate on behalf of victims, favors the risk assessment model because “over-inclusive public notification can actually be harmful to public safety by diluting the ability to identify the most dangerous offenders and by disrupting the stability of low-risk offenders in ways that increase their risk of re-offense.”¹⁷ The NAESV therefore recommends “internet disclosure and community notification limited to those who pose the highest risk of re-offense.”¹⁸ The NAESV also recommends that it be limited to “those offenders whose public disclosure will not immediately or implicitly identify the victim,” so that victims who are related to the offender are not deterred from reporting.¹⁹

The Association for the Treatment of Sexual Abusers also recommends the risk assessment model for public safety reasons:

The ability to predict sexual dangerousness has improved markedly over the past decade as a result of studies identifying risk factors for violent and sexual recidivism. . . . By classifying offenders into risk groups based on the existence of known risk factors,

communities may be able to identify more accurately those sex offenders who pose the greatest threat to public safety. At the same time, differential notification strategies can improve cost-effectiveness. Risk level systems might also decrease some of the negative effects of community notification on lower risk offenders. In fact, many states have decided that because the consequences of notification are so severe, they will only notify the public about offenders who pose a high risk to minimize disrupting the stability of low risk offenders in ways that may increase their risk.²⁰

The National Conference of State Legislatures opposes SORNA, and many states are considering forgoing the Byrne grant funds, because SORNA is too costly and burdensome, conflicts with state constitutional and statutory provisions, and interferes with state policies that better protect the public.²¹ To date, only eight states have passed SORNA legislation, four of those states have submitted their legislation to the Attorney General for approval, two were rejected as not in compliance, and two have not received an answer. Thousands of lawsuits are pending in states that have enacted SORNA legislation, challenging its constitutionality. From a financial standpoint, SORNA is a raw deal for the states. According to a study by the Justice Policy Institute, the first-year cost of implementing SORNA would exceed the loss of Byrne grant funds by orders of magnitude in every state, ranging from a low in Wyoming of \$789,605 to a high in California of \$57,100,134.²² Further, it is unclear whether this study includes litigation costs. For example, Ohio sent registered letters to 36,000 people informing them that they had been retroactively reclassified under its new SORNA law, return receipt requested. The cost of the mailing was about \$500,000.²³ Being reclassified meant longer durational requirements than under prior law; indeed, many were about to be removed from the registry but would now remain on, some for life. Thus, over half of the reclassified offenders filed suit, which will cost the state many millions of dollars.²⁴

IV. Why the Risk Assessment Model Is a Better Approach

All available data indicate that registration and notification have had little or no effect in preventing sexual abuse, reducing sex offense recidivism, or protecting children.²⁵ If there must be such laws, they should first do no harm, and second be reserved for offenders who are actually dangerous. The Center for Sex Offender Management, a project of the Department of Justice, advises that strategies with a rehabilitative focus have much more promising outcomes than “get tough” strategies focused on punishment and surveillance.²⁶ It recommends “careful assessment of the likelihood of recidivism” through “identification of risk factors associated with recidivism” to devise strategies that “best protect the community and reduce the likelihood of further victimization.”²⁷

A. Most Sex Offenders Do Not Reoffend and Sex Offenders Reoffend at a Much Lower Rate Than the General Criminal Population

Recidivism rates are much lower for sex offenders than for the general criminal population.²⁸ Indeed, according to studies by the Bureau of Justice Statistics of the Department of Justice and by the Canadian government, the vast majority of sex offenders do not reoffend.²⁹ In a study by the Canadian government that followed sex offenders of all types for fifteen years after release, which is quite a long time for a recidivism study, only 24 percent were arrested for a new sex crime.³⁰ The Bureau of Justice Statistics found that 5.3 percent of sex offenders were rearrested for a sex crime within three years of release, whereas 68 percent of non-sex offenders were rearrested within three years of release.³¹ To put this in perspective, rearrest rates within three years of release were 70.2 percent for robbers, 74 percent for burglars, 74.6 percent for larcenists, 78.8 percent for motor vehicle thieves, 77.4 percent for stolen property offenders, and 70.2 percent for weapons offenders.³²

B. Recidivism Can Be Predicted and the Risk of Reoffense for Most Sex Offenders Can Be Controlled

It is well established that “the variation in recidivism rates suggests that not all sex offenders should be treated the same.”³³ Recidivism rates vary markedly based on the type of sex offender.³⁴ Ninety-three percent of child sexual abuse victims are molested not by strangers but by family members or others they know and trust.³⁵ The myth that “stranger danger” is rampant and is somehow controlled by public sex offender registries is incorrect and gives parents a false sense of security. Sex offenders with the highest likelihood of recidivism—strangers who molest boys—are also the most rare.³⁶

Sex offense recidivism declines with age,³⁷ and the longer the offender remains offense-free in the community, the less likely he is to commit another sex offense.³⁸

Contemporary treatment methods, particularly cognitive-behavioral therapy, substantially reduce recidivism.³⁹ Studies comparing offenders who complete this kind of treatment with offenders who receive no treatment or who do not complete treatment show differences in recidivism rates ranging from 37 percent to over 50 percent.⁴⁰

Numerous studies show that safety and stability, social support, steady employment, and education are essential factors in decreasing recidivism.⁴¹

C. One-Size-Fits-All Schemes like SORNA Interfere with Rehabilitation, Unnecessarily Harm Offenders and Their Families, Deter Reporting, and Lessen Public Safety

The stigma and harassment stemming from Internet publication creates tremendous instability in the lives of sex offenders and thus increases their risk of recidivism.⁴² A substantial percentage of sex offenders, as a result of com-

munity notification, suffer job loss, homelessness, physical assault, threats, harassment, property damage, and harm to family members.⁴³ A few have even been murdered, including a man whose offense was having sex with his fifteen-year-old girlfriend when he was nineteen years old.⁴⁴ Under federal law, public and Indian housing must be denied if any member of a household is subject to lifetime registration under a sex offender registry,⁴⁵ and many localities are enacting laws denying housing to registered sex offenders and placing large geographical areas off limits for sex offenders to live. It only stands to reason that a person without a job or a home is unlikely to attend treatment and is at greater risk at least of committing property crimes in order to survive. Unintended consequences like these can interfere with rehabilitation, make sex offenders more difficult to supervise and less likely to receive treatment, and thus diminish public safety.⁴⁶

Most sex offenses are committed by family members or friends. When the consequences are too harsh, families do not report to law enforcement or seek treatment for their loved ones.⁴⁷ Moreover, while the victim's identity may not be disclosed under SORNA,⁴⁸ when the abuse is interfamilial, as it so often is, the victim's identity is disclosed by identifying the offender.

V. Conclusion

Congress should scrap the SORNA. The states should be permitted to classify sex offenders according to their own policies. The states that have adopted the risk assessment model have it right. Congress should offer financial assistance to all of the states, territories, and tribes to study and adopt evidence-based practices, including the risk assessment model of sex offender registration and notification, and up-to-date sex offender treatment methods.

Notes

¹ 42 U.S.C. §§ 16911(9), 16912, 16924, 16925(a), 16927.

² See 42 U.S.C. § 16911(5), (6), (7), (14).

³ See 42 U.S.C. §§ 16911(8).

⁴ See 42 U.S.C. §§ 16911(5)(C).

⁵ See 42 U.S.C. § 16911(4)(A)(i).

⁶ See 42 U.S.C. § 16911(3)(A)(iv).

⁷ Tier III offenders are subject to lifetime registration and Internet publication, unless their offense was a juvenile adjudication and they complete treatment and have had a clean record for twenty-five years. Tier II offenders are subject to registration and Internet publication for twenty-five years, with no possibility of relief. Offenders in Tier I, which includes only misdemeanors, possession of child pornography, and sexual contact with an adult that does not involve an attempted or completed sexual act, are subject to registration and notification for fifteen years, which can be reduced if they complete treatment and have a clean record for ten years. See 42 U.S.C. § 16915. According to recent guidelines published by the Attorney General, the jurisdictions may exempt from their Web sites Tier I offenders convicted of an offense that is not a “specified offense against a minor.” See The National Guidelines for Sex Offender Registration and Notification (“National Guidelines”) at 35, http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf. This does not appear to be

- meaningful, since possession of child pornography is a "specified offense against a minor," see 42 U.S.C. § 16911(7), any sexual misdemeanor may be a "specified offense against a minor," *id.*, and the number of existing crimes that involve sexual contact with an adult but do not involve an attempted or completed sexual act is probably quite small. The exclusion does not apply to consensual sex between teenagers if the age difference was more than four years, nor does it apply to juvenile adjudications. See 42 U.S.C. § 16911(5)(C), (8).
- ⁸ See Rules and Regulations, Department of Justice, 28 C.F.R. Part 72, February 28, 2007, 72 FR 8894-01, 2007 WL 594891; National Guidelines, *supra* note 7, at 7, 45-47.
- ⁹ *Id.*
- ¹⁰ National Guidelines, *supra* note 7, at 8, 46.
- ¹¹ The courts have dismissed numerous failure to register prosecutions as in violation of the Ex Post Facto Clause, the Due Process Clause, the Commerce Clause, or Separation of Powers, or because the defendant was not required to register under the plain terms of SORNA because no jurisdiction in which he lived, worked, or went to school had implemented the law.
- ¹² See 42 USC 14071(b)(2), (e).
- ¹³ 64 Fed. Reg. 572, 582 (Jan. 5, 1999); 70 Fed. Reg. 12721, 12722 (March 15, 2005).
- ¹⁴ Jill S. Levenson & David A. D'Amora, *Social Policies to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIMINAL JUSTICE POLICY REVIEW 168, 171, 177 (2007).
- ¹⁵ Pub. L. No. 109-248 § 129(b) (42 U.S.C. § note).
- ¹⁶ National Guidelines, *supra* note 7, at 10.
- ¹⁷ NAESV, *Legislative Analysis: The Adam Walsh Child Protection and Safety Act of 2006*, available at http://www.naevs.org/Policypapers/Adam_Walsh_SumMarch07.pdf.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ Association for the Treatment of Sexual Abusers, *The Registration and Notification of Adult Sex Offenders* (October 2005), <http://www.atsa.com/ppnotify.html>.
- ²¹ See National Conference of State Legislatures, Adam Walsh Policy, <http://www.ncsl.org/statefed/LAWANDJ.HTM#AdamWalsh>.
- ²² Justice Policy Institute, *What Will It Cost States to Comply with the Sex Offender Registration and Notification Act?*, http://www.justicepolicy.org/images/upload/08-08_FAC_SORNA_Costs_JJ.pdf.
- ²³ Telephone Conference with Amy Borrer, Public Information Officer, Office of the Ohio Public Defender, July 23, 2008.
- ²⁴ Telephone Conference with Timothy Young, Ohio Public Defender, July 23, 2008.
- ²⁵ Jill S. Levenson & David A. D'Amora, *Social Policies to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIMINAL JUSTICE POLICY REVIEW 168, 180-82 (2007) (reviewing studies).
- ²⁶ CSOM, *Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses* at 1, 11 (November 2006).
- ²⁷ CSOM, *Recidivism of Sex Offenders* at 4 (May 2001).
- ²⁸ CSOM, *Myths and Facts about Sex Offenders* (August 2000).
- ²⁹ U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* (November 2003) (5.3 percent of 9691 sex offenders released from prison in 1994 were rearrested for a new sex crime within three years); R. K. Hanson & K. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-analysis of Sexual Offender Recidivism Studies*, 73 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 1154 (2005) (of 19,267 sex offenders of all types, 14 percent were charged or convicted of a new sex crime within five to six years); R. K. Hanson & M. T. Bussiere, *Predicting Relapse: A Meta-analysis of Sexual Offender Recidivism Studies*, 66 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 348 (1998) (of 29,450 sex offenders, 14 percent of all types, 13 percent of child molesters, and 20 percent of rapists were charged or convicted of a new sex crime within four to five years).
- ³⁰ A. J. R. Harris & R. K. Hanson, *Sex Offender Recidivism: A Simple Question* at 7, Public Safety and Emergency Preparedness Canada (2004), http://ww2.ps-sp.gc.ca/publications/corrections/pdf/200403-2_e.pdf.
- ³¹ U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* (November 2003).
- ³² U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* (2002).
- ³³ Harris & Hanson, *supra* note 29.
- ³⁴ CSOM, *Myths and Facts about Sex Offenders* (August 2000). Incest offenders and extrafamilial child molesters of girls have the lowest rate of rearrest (13 percent and 16 percent, respectively), rapists of adult women have the next highest (24 percent), and extrafamilial child molesters of boys have the highest (35 percent). See Harris & Hanson, *supra* note 29, at 7.
- ³⁵ See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* (2000) (34 percent of child sexual abuse perpetrators are family members and 59 percent are acquaintances).
- ³⁶ Only 7 percent of perpetrators against children are strangers, and only 18 percent of sexual assault victims under the age of eighteen are girls. See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* (2000).
- ³⁷ R. K. Hanson, *Recidivism and Age: Follow-up Data from 4,673 Sexual Offenders*, 17 JOURNAL OF INTERPERSONAL VIOLENCE 1046 (2002).
- ³⁸ Harris & Hanson, *supra* note 29, at 7.
- ³⁹ CSOM, *Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses* at 10-11 (November 2006); CSOM, *Myths and Facts about Sex Offenders* (August 2000).
- ⁴⁰ F. Losel & M. Schmucker, *The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-analysis*, 1 JOURNAL OF EXPERIMENTAL CRIMINOLOGY 117 (2005) (offenders treated with cognitive-behavioral therapy showed 37 percent less sexual recidivism than untreated offenders); R. K. Hanson, A. Gordon, A. J. R. Harris, J. K. Marques, V. L. Quinsey, et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Treatment for Sex Offenders*, 14 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 169 (2002) (cognitive-behavioral methods associated with reductions in sexual recidivism [from 17.4 to 9.9 percent] and general recidivism [from 51 to 32 percent]); Jan Looman et al., *Recidivism among Treated Sexual Offenders and Matched Controls: Data from Regional Treatment Centre (Ontario)*, 3 JOURNAL OF INTERPERSONAL VIOLENCE 279-90 (Mar. 2000) (recidivism rate reduced from 51.7 percent to 23.6 percent with treatment); *Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases*, State of Ohio Department of Rehabilitation and Correction (April 2001) (sex-related recidivism after basic sex offender programming was 7.1 percent as compared to 16.5 percent without programming); Dennise Orlando, *Sex Offenders*, Special Needs Offenders Bulletin, a publication of the Federal Judicial Center, No. 3, Sept. 1998, at 8 (analysis of sixty-eight recidivism studies showed recidivism rate of 10.9 percent for treated offenders vs. 18.5 percent for untreated offenders, 13.4 percent with group therapy, 5.9 percent with relapse prevention combined with behavioral and/or group treatment); Vermont Department of Corrections, *Facts and Figures FY 2007* (sex offense recidivism rate was 5 percent for inmates

who completed treatment vs. 30 percent for inmates who received no treatment).

- ⁴¹ See R. K. Hanson & K. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-analysis of Recidivism Studies*, 73 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 1154 (2005); C. A. Kruttschnitt, C. Uggen, & K. Shelton, *Predictors of Desistance among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 JUSTICE QUARTERLY 61 (2000); J. Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003).
- ⁴² See R. K. Hanson & K. Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-analysis*, Public Works and Government Services, Ottawa, Canada (2004); Association for the Treatment of Sexual Abusers, *The Registration and Community Notification of the Adult Sex Offender* at 3 (2005), <http://www.atsa.com/ppnotify.html>.
- ⁴³ Levenson & D'Amaro, *supra* note 14, at 182.
- ⁴⁴ See John R. Ellement and Suzanne Smalley, *Sex Crime Disclosure Questioned*, THE BOSTON GLOBE, April 18, 2006.
- ⁴⁵ See 24 C.F.R. §§ 5.856, 960.204.
- ⁴⁶ See Richard Roesler, *Sex Offenders without Addresses Throw Notification System for a Loop*, THE SPOKANE SPOKESMAN REVIEW, September 6, 2005.
- ⁴⁷ Letter from the Association for the Treatment of Sexual Abusers to Director of SMART Office, U.S. Dept. of Justice, at 2, July 30, 2007 ("SORNA will almost certainly decrease parental willingness to report or seek help for children's sexual problems when they understand the result will be lifetime public registration."), <http://www.atsa.com/pdfs/SORNA.pdf>; *id.* at 6 ("SORNA has the potential to drive victims underground. Well over 90% of offenders commit offenses against family members.").
- ⁴⁸ 42 U.S.C. § 16918.

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